No. 89-144 (4)

FILED
SEP 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOCAL UNION NO. 246, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

BICKERSTAFF CLAY PRODUCTS CO., INC., ET AL.

ON PETITIONS FOR LEAVE TO INTERVENE AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the court of appeals correctly concluded that the employer, unaided by any presumption regarding the extent of union support among replacements for striking employees, sufficiently established a good-faith doubt that the incumbent union enjoyed continued majority status.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Brooks v. *NLRB*, 348 U.S. 96 (1954)	6
Curtin Matheson Scientific, Inc. v. *NLRB*, 859 F.2d 362 (5th Cir. 1988), cert. granted, No. 88-1685 (June 26, 1989)	4, 7
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987)	6, 7
International Union, United Automobile Workers, Local 283 v. *Scofield*, 382 U.S. 205 (1965)	6
NLRB v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972)	6
NLRB v. *Pennco, Inc.*, 684 F.2d 340 (6th Cir.), cert. denied, 459 U.S. 994 (1982)	7
NLRB v. *Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978)	8
NLRB v. *Windham Comm. Memorial Hosp.*, 577 F.2d 805 (2d Cir. 1978)	7
Retired Persons Pharmacy v. *NLRB*, 519 F.2d 486 (2d Cir. 1975)	7
Station KKHI, 284 N.L.R.B. No. 113 (July 27, 1987)	3
Whisper Soft Mills, Inc. v. *NLRB*, 754 F.2d 1381 (9th Cir. 1984)	7

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 8(a)(1), 29 U.S.C. 158(a)(1)	3

Statutes—Continued: Page

§ 8(a) (5), 29 U.S.C. 158(a) (5) 3
§ 9, 29 U.S.C. 159 6
§ 9, 29 U.S.C. 159(c) (3) 6

Miscellaneous:

R. Gorman, *Labor Law* (1970) 4
R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 6

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-144

LOCAL UNION NO. 246, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

BICKERSTAFF CLAY PRODUCTS CO., INC., ET AL.

ON PETITIONS FOR LEAVE TO INTERVENE AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 871 F.2d 980. The decision and order of the Board (Pet. App. 30a-54a) are reported at 286 N.L.R.B. No. 27.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1989. The petitions for leave to intervene and for a writ of certiorari were filed on July 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Bickerstaff Clay Products Co., Inc., makes and sells brick and tile products. In 1965, Bickerstaff voluntarily recognized petitioner ("the Union") as the bargaining representative for certain of its production and maintenance employees. The parties thereafter negotiated a series of labor agreements. On November 11, 1985, after the parties had failed to consummate a new agreement, the Union commenced an economic strike. Bickerstaff continued its operations during the strike, relying on striker replacements, employees who elected not to join the strike, and "crossover" employees, who crossed the picket line and returned to work prior to the conclusion of the strike. Pet. App. 2a-3a, 30a n.1

On January 23, 1986, Bickerstaff advised the Union that negotiations were at an impasse and that the Company would institute the wages and other benefits proposed in its final offer, set forth on November 6, 1985. The Union did not respond until April 8, 1986. On that date, the Union offered to accept the final offer and return to work. It also asked Bickerstaff for a list of all employees currently working, along with various additional information regarding the working employees. Pet. App. 4a.

The following day, April 9, Bickerstaff declined to execute an agreement with the Union and, ex-

pressing its "serious[] doubt that [the] union represents a majority of [the] employees" (Pet. App. 5a), withdrew recognition from the Union. The Company also refused to furnish the requested information concerning the existing workforce. As of April 9, there were 304 employees at work, of whom 93 were permanent replacements, 133 were crossovers, and 78 were employees who had not struck. Pet. App. 4a-5a, 30a n.1.

2. Acting on charges filed by the Union, the Board held that Bickerstaff's withdrawal of recognition violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. 30a-54a. The Board agreed with the administrative law judge (ALJ) that "the total evidence presented by [Bickerstaff] is insufficient to rebut the presumption of the continued majority status that the Union enjoyed as the incumbent bargaining representative" (Pet. App. 30a-31a n.2).[1] In reaching that result, the Board, citing its recent decision in *Station KKHI*, 284 N.L.R.B. No. 113 (July 27, 1987), explained that it was "unnecessary to apply any presumption whether the employees who replaced the strikers supported or did not support the Union" (Pet. App. 31a n.2). The Board ordered the Com-

[1] The ALJ rejected the Company's reliance on strike-related violence, finding that it had all occurred at the very beginning of the strike (Pet. App. 44a-45a). The ALJ further found that 38 dues check-off cancellations by employees did not evidence withdrawal of support from the Union, that 15 resignations from the Union did not constitute a "substantial" withdrawal, and that "there was no probative evidence showing that a substantial number of the replacements expressed disinterest in the Union" (*id.* at 46a, 48a). Finally, the ALJ found no evidence that petitioner had abandoned its representative duties (*id.* at 47a).

pany to recognize the Union and to bargain with it on request (*id.* at 50a-51a).

3. The court of appeals denied enforcement, holding that Bickerstaff had established a sufficient good-faith doubt of the Union's majority status (Pet. App. 1a-29a). The court explained that "the substantial number of resignations and dues check-off authorization[] [withdrawals] in the circumstances of this case"—which included picket line violence (*id.* at 17a) and a "breakdown in union leadership, union dormancy, and employee dissatisfaction and disillusionment with the Union" (*id.* at 26a)—provided "an objective basis for believing that a substantial number of returning strikers no longer desired union representation" (*id.* at 16a-17a).

With respect to the striker replacements, the court noted that some circuits "seem to rely on the statement made by one commentator, R. Gorman, *Labor Law* (1970), that 'if a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the Union and that he ought not be counted toward a Union majority' " (Pet. App. 19a, quoting R. Gorman, *supra*, at 112). The court refused to apply that presumption (see Pet. App. 21a-22a), however,[2] and looked instead to the

[2] The court criticized the reasoning of the Fifth Circuit's decision in *Curtin Matheson Scientific, Inc.* v. *NLRB*, 859 F.2d 362 (1988), cert. granted, No. 88-1685 (June 26, 1989), in which that court had approved the so-called "Gorman presumption." The court below explained that the Fifth Circuit had erroneously supposed that the Board's no-presumption rule articulated in *Station KKHI* and its prior rule—presuming that replacements support the union in the same ratio as the workers they replace—were operationally the same. To the contrary, the court below noted, the no-presumption rule

particular circumstances of the strike in gauging the sentiments of the striker replacements. In the present case, the court explained, "the Company expressly rejected proposals made by the mediator on behalf of the Union that Bickerstaff's strike replacements be discharged so that striking employees could return to work" (*id.* at 23a). Moreover, the court stated, "the strike replacements had to cross a picket line, at least for a time, in an atmosphere of violence" (*ibid.*). The court concluded that "it is highly unlikely that a replacement worker supports the union if the union is negotiating for his discharge and he crosses a union-supported picket line, violence or not, to report to work each day" (*id.* at 23a-24a). "Under the facts of this case," the court concluded, "the Company was justified in counting the striker replacements as employees whom [*sic*] the Company doubts supports [*sic*] the Union" (*id.* at 24a).

In sum, the court found "a composite showing of objective evidence which is sufficient to establish, clearly and convincingly, that Bickerstaff had a reasonable basis to support a good faith doubt as to the representative status of the Union" (Pet. App. 27a). The court therefore held that the Company did not violate the Act when it withdrew recognition from the Union, failed to furnish the requested information, and refused to execute a contract based on the Company's last offer (*id.* at 29a).

---

alters "the nature and amount of evidence" which the employer must adduce, and gives the Board "more flexibility to consider each situation on its own facts" (Pet. App. 22a).

ARGUMENT

Although entitled, on the filing of a timely motion, to intervene as of right in the court of appeals, *International Union, United Automobile Workers, Local 283* v. *Scofield*, 382 U.S. 205, 217-221 (1965), thereby ensuring its standing to petition this Court for review of an adverse decision, petitioner elected not to do so. Moreover, after the court of appeals refused to enforce the Board's order, petitioner chose not to move in that court for intervenor status, either before or after learning that the Board had determined not to seek certiorari. Petitioner now asks this Court to grant it intervenor status, but does not identify the proceeding, if any, that is now pending before this Court and in which it seeks to intervene. In any event, intervention before this Court is granted "[o]nly for the most imperative of reasons" (R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* 341 (6th ed. 1986)), and petitioner has not advanced such reasons here. The petition for leave to intervene, and, if reached, the petition for a writ of certiorari, should be denied.

1. Pursuant to Section 9 of the National Labor Relations Act, 29 U.S.C. 159, the National Labor Relations Board may certify a particular labor organization as the exclusive bargaining representative for a company's employees. Once the Board has done so, the union "usually is entitled to a conclusive presumption of majority status for one year following the certification." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37 (1987). Accord *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 279 n.3 (1972); *Brooks* v. *NLRB*, 348 U.S. 96, 98-99 (1954). See also 29 U.S.C. 159(c)(3). "[A]fter this period, the union is entitled to a

rebuttable presumption of majority support." *Fall River Dyeing*, 482 U.S. at 38; *Burns International*, 406 U.S. at 279 n.3. An employer may rebut that presumption and withdraw recognition from the union by showing either (1) that the union did not in fact enjoy majority status, or (2) that there was a sufficient, objective basis for a reasonable doubt of the union's majority status.[3]

2. In reaching its decision in the present case, the Board, relying on *Station KKHI*, noted that, in evaluating Bickerstaff's claim that it had a good-faith doubt about the Union's majority status, it would make no presumption concerning the union sentiments of the striker replacements hired by the Company (Pet. App. 31a n.2). The lawfulness of the Board's no-presumption rule is presently before the Court in *NLRB* v. *Curtin Matheson Scientific, Inc.*, No. 88-1685.[4] The Fifth Circuit in *Curtin Matheson* rejected the no-presumption rule in favor of the Gorman presumption, according to which striker replacements are presumed to oppose the incumbent union. In our brief in that case, we have argued that this presumption lacks a sufficient empirical basis, disserves bargaining stability, and imposes too high a cost on the exercise of the protected right to strike.

Petitioner contends (Pet. 12-14) that the decision below presents the same question as that at issue in

---

[3] See, *e.g.*, *Whisper Soft Mills, Inc.* v. *NLRB*, 754 F.2d 1381, 1387 (9th Cir. 1984); *NLRB* v. *Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), cert. denied, 459 U.S. 994 (1982); *NLRB* v. *Windham Comm. Memorial Hosp.*, 577 F.2d 805, 811 (2d Cir. 1978); *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 489 (2d Cir. 1975). Cf. *Fall River Dyeing*, 482 U.S. at 41 n.8.

[4] We have furnished a copy of our brief in *Curtin Matheson* to petitioner's counsel.

Curtin Matheson. That is not so. The court of appeals in this case did not apply the Gorman presumption. Rather, looking to the record as a whole —including the Union's conduct of the picket line, and its determination to oust the striker replacements as part of its proposed back-to-work agreement—the court concluded that "[u]nder the facts of this case * * * the Company was justified in counting the striker replacements as employees whom [*sic*] the Company doubts supports [*sic*] the Union" (Pet. App. 24a).[5] Although the Board disagrees with the court's assessment of the evidence, that disagreement raises only a fact-bound issue that does not warrant review by this Court.

---

[5] Contrary to petitioner's contention (Pet. 12-13), the fact that both the court below and the Fifth Circuit in *Curtin Matheson* relied on the same precedent, *NLRB* v. *Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), does not establish that the court below adopted the Gorman presumption. Thus, whereas the *Curtin Matheson* court interpreted *Randle-Eastern* as having adopted that presumption (859 F.2d at 367), the court below, although acknowledging that the *Randle-Eastern* court "did approvingly cite to Professor Gorman's treatise," concluded that the *Randle-Eastern* court's "decision to include permanent replacements as objective evidence of loss of union support was based on the fact that the Union was bargaining for the discharge of striker replacements to make room for the strikers," as well as the fact that there was "picket line violence with respect to striker replacements" (Pet. App. 22a). "The decision in *Randle-Eastern*," the court below said, "should be limited to the specific facts of the case" (*id.* at 22a-23a).

CONCLUSION

The petition for leave to intervene, and, if reached by this Court, the petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board

SEPTEMBER 1989

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 241699 522